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ALEXANDER L. STEVAS,

No. 82-1845

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE STATE OF COLORADO, PETITIONER

v.

ANTONIO GUADALUPE NUNEZ

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a criminal defendant seeking to suppress evidence obtained pursuant to a facially valid warrant that was based in part on information supplied by a confidential informant may compel the disclosure of the informant's identity by offering his own testimony tending to show that the informant's statements were false.

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INTEREST OF THE UNITED STATES

This case presents a question concerning the circumstances in which the prosecution may be required to disclose the identity of a confidential informant during a hearing on a motion to suppress evidence challenging the accuracy of information contained in a search warrant affidavit. The use of informants is vital to the law enforcement efforts of the United States in many areas, particularly those dealing with organized crime and narcotics. The premature or unnecessary disclosure of informants' identities can

subject them to reprisals, and even the possibility that such disclosures might occur can substantially undermine the government's ability to conduct investigations, gather evidence, and bring prosecutions. The United States therefore has a substantial interest in ensuring that the identities of confidential informants not be revealed unnecessarily.

STATEMENT

On November 7, 1981, Sergeant DeNovellis of the Denver police force executed an affidavit stating in part that a confidential informant had told him that during the previous day the informant saw respondent, at respondent's home, in possession of a large amount of heroin. The affidavit recited that the informant said he had seen respondent diluting the heroin and packaging it in ballons, and that respondent had told the informant that respondent had just returned from Mexico with five ounces of heroin. Sergeant DeNovellis's affidavit further stated that the informant was familiar with the appearance of heroin and had admitted using it, and that the informant had proved reliable on at least two occasions in the previous 18 months, "giving your affiant information involving narcotic activity, and resulting in the recovery of a quantity of heroin." J.A. 5, 135-136.

On the basis of this affidavit, a local judge issued a search warrant. Police officers searched respondent's house pursuant to the warrant. Respondent was at home during the search and the officers found heroin on respondent's person. He was arrested and charged with possession of heroin. Before trial, respondent filed motions to compel the disclosure of the informant's identity and to suppress the heroin. J.A. 136.

At a hearing on the motions, respondent testified that he had been on a hunting trip from October 31 until November 6 and that he had not been to Mexico during that period, nor told anyone that he had been to Mexico during that period. Respondent testified that only family members had been in his house on November 6; he also testified that he knew of heroin only through television and newspapers. Sergeant DeNovellis also testified at the suppression hearing and stood by the statements he made in his affidavit. J.A. 43-46, 54, 59-64.

On the basis of this testimony, the trial court ordered the State to disclose the identity of the confidential informant to respondent. When the State refused to do so, the trial court ordered the heroin suppressed. The State appealed, and the Colorado Supreme Court affirmed. J.A. 134-139. The Colorado Supreme Court explained (*id.* at 138-139; footnotes and citations omitted):

> The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of *People* v. *Dailey*[, 639 P.2d 1068 (Colo. 1982)]. *Dailey* recognized that errors in an affidavit for a search warrant can result "from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant." 639 P.2d at 1075. When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies or sanctions is left to the discretion of the [trial] court. The necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in

> fact to question the accuracy of the informant's recitals.
>
> * * * Where the [trial] court has determined that the defendant has shown a good faith basis in fact to question the accuracy of an affidavit containing recitals based on information supplied by an unnamed informant and consequently has ordered that the informant be disclosed or be produced for an *in camera* hearing, we will not disturb that ruling.

SUMMARY OF ARGUMENT

The decision of the Colorado Supreme Court is inconsistent with two important principles established by this Court—the rule of *Franks* v. *Delaware*, 438 U.S. 154 (1978), that a facially valid search warrant can be challenged only if the defendant makes a substantial showing that the affiant's statements were deliberately false or recklessly inaccurate; and the informant's privilege, which permits the government to withhold the identity of a confidential informant unless the defendant makes a compelling showing that he must learn the informant's identity.

1. In *Franks*, the Court emphasized the costs of allowing a warrant that shows probable cause on its face to be challenged in a suppression hearing. Such challenges use judicial resources and give defendants an opportunity to discover the government's case. For these reasons, the Court in *Franks* took care to hold that a defendant is not entitled to a hearing on his challenge to a facially valid warrant unless he makes a substantial preliminary showing that the affiant's statements were deliberately false or recklessly inaccurate.

The only showing respondent made was his own self-serving testimony contradicting the informant's

statements. Since many criminal defendants will perjure themselves in order to obstruct a prosecution, to allow a defendant's testimony alone to compel a hearing on the truthfulness of a search warrant affidavit is almost tantamount to requiring such a hearing on the defendant's demand—a course emphatically rejected by *Franks*. Moreover, respondent's testimony tended to show only that the informant's statements were false. Even if credited, respondent's testimony did not tend to show—what *Franks* and basic Fourth Amendment principles require—that the *affiant's* statements were recklessly or deliberately false.

Not only did respondent's testimony fail to satisfy *Franks*; it did not approach being sufficient to require the disclosure of the informant's identity. The reasons for the informant's privilege are apparent. The government often continues to use an informant after he has supplied information in connection with a particular prosecution; and, more important, an informant whose identity has been revealed can be subject to the most serious reprisals at the hands of those he incriminates. Moreover, because potential informants will commonly be extremely wary—often with good reason—not only actual disclosures of informants' identities, but the threat of disclosure, or even the perception that disclosure is a serious possibility, can have a devastating effect on the ability of law enforcement authorities to recruit informants. Indeed, even in camera disclosures can have a harmful effect.

For these reasons, the Court has ruled that a defendant must make a substantial showing of need in order to discover an informant's identity even when the informant's testimony will be relevant to the question of guilt or innocence. When an informant's

testimony will be relevant only at a suppression hearing, the defendant's burden is much greater. And when the informant's testimony is sought only to impeach a search warrant that is valid on its face, the disclosure of the informant's identity should be permitted, if at all, only in the most extraordinary circumstances.

The Colorado Supreme Court allowed respondent to meet this burden with his own self-serving testimony. If such testimony is sufficient to require the disclosure of the informant's identity, any defendant who is willing to contradict the statements of an informant can defeat a criminal prosecution entirely whenever law enforcement authorities fear that disclosing the informant's identity will risk subjecting him to reprisals, because most prosecutors will permit crucial evidence to be suppressed before they will take such a risk. An approach that permits a defendant to escape prosecution so easily should not be sanctioned.

2. Even when a trial court determines that a defendant has made the substantial preliminary showing required by *Franks*, it should not order the disclosure of the informant's identity, even in camera, as a matter of course. The court can allow cross-examination of the affiant by defense counsel. In addition, the affiant can be questioned more searchingly in camera by the court.

Such examination of the affiant should ordinarily be sufficient to enable the trial judge to decide if the affiant has deliberately or recklessly made false statements. The informant's testimony should seldom be necessary, because the issue is the credibility of the affiant—who is usually a law enforcement officer—and a trial judge will usually be able to reach a con-

clusion about the officer's truthfulness by observing his testimony. Indeed, if the informant's identity is being withheld because of the danger of reprisals, any testimony the informant gives under circumstances in which he fears that the defendant might learn his identity—circumstances that can include an in camera hearing—will necessarily be suspect.

For these reasons, requiring the testimony of the informant, even in camera, should be the last resort. But if the trial judge nevertheless decides that the informant's testimony is necessary, we can think of no reason why an in camera examination of the informant will not always suffice. It is true that adversary proceedings are customary in our system, but the Fourth Amendment is an exception; the Warrant Clause reflects a judgment that an in camera, ex parte proceeding is adequate to protect the interests underlying that Clause if an adversary proceeding would impose excessive costs on important societal interests.

ARGUMENT

RESPONDENT'S TESTIMONY DID NOT ENTITLE HIM TO COMPEL THE DISCLOSURE OF THE INFORMANT'S IDENTITY

A. The decision of the Colorado Supreme Court is inconsistent with this Court's decisions in two distinct and important ways.[1] First, the Colorado Supreme Court did not heed the rule of *Franks* v. *Delaware*, 438 U.S. 154 (1978), that a challenge to a facially valid search warrant will be permitted only

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[1] In his Brief in Opposition, respondent contended that the Colorado Supreme Court's decision had an adequate and independent basis in state law (Br. in Opp. 2-3). We take no position on this contention but assume, throughout this brief, that the decision below is based on federal law.

if the defendant makes a substantial showing that the affidavit supporting the warrant contains material statements that were intentionally false or made with reckless disregard of the truth. Second, the Colorado Supreme Court gave grossly insufficient weight to the so-called informant's privilege—the government's right to withhold the identity of an informant unless the defendant can show a compelling need for disclosure.

1. The Colorado Supreme Court did not suggest that Sergeant DeNovellis's affidavit, on its face, failed to establish probable cause, and the affidavit manifestly does show probable cause if its statements are accepted as true. In *Franks*, this Court held that evidence obtained pursuant to a warrant based on such an affidavit may not be suppressed unless the defendant shows that the affidavit contained material statements that were intentionally false, or were made with reckless disregard of the truth. Innocent or negligent inaccuracies, the Court held, do not taint the warrant or require suppression of the evidence. 438 U.S. at 155-156, 171.

The Court in *Franks* explicitly noted that "[t]he deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant" (438 U.S. at 171). This follows directly from the language of the Fourth Amendment, the decisions of this Court, and the rule of *Franks* itself. The Fourth Amendment prohibits only unreasonable searches, and "a warrant based on information which the affiant and the magistrate both had reasonable grounds for believing is a reasonable one" (Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 Harv. L. Rev.

825, 832 (1971)), even if the information is later discovered to be false or erroneous. Warrants may issue on probable cause, and if there was probable cause to believe the informant's statement to be true, its falsity does not vitiate the warrant. The Court made this point clear many times before *Franks*. See, *e.g.*, *United States* v. *Harris*, 403 U.S. 573, 579-580 (1971) (plurality opinion); *Rugendorf* v. *United States*, 376 U.S. 528, 533 (1964); *Jones* v. *United States*, 362 U.S. 257, 269-272 (1960). See also *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). And of course under *Franks*, if the affiant reasonably believed the informant's false statements—or even if he was merely negligent in failing to discover their falsehood—the warrant is not invalid. The Colorado Supreme Court gave no indication of understanding these fundamental principles.

Moreover, the Court in *Franks* emphasized that a defendant is not entitled to a hearing on the truthfulness of a warrant affidavit as a matter of course. A defendant is to receive such a hearing only if he "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause" (438 U.S. at 155-156).

The Court required such a showing in large part because it was concerned that routine inquiries into the truthfulness of statements made in search warrant affidavits would prove burdensome and time-consuming for the courts and would be used for discovery by defendants. The Court recognized that law enforcement authorities were legitimately concerned that "if such hearings were conducted rou-

tinely * * * they would be misused by defendants as a convenient source of discovery. Defendants might even use the hearings in an attempt to force revelation of the identity of informants." 438 U.S. at 167. And the Court explained that "[t]he requirement of a substantial preliminary showing" is intended "to prevent the misuse of a veracity hearing for the purposes of discovery and obstruction" (*id.* at 170).

2. The informant's privilege serves many interests that are distinct from, but certainly no less important than, those protected by the rule of *Franks* v. *Delaware*:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. * * * The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Roviaro v. *United States*, 353 U.S. 53, 59 (1957). For these reasons, "public policy forbids disclosure of an informer's identity unless essential to the defense" (*Scher* v. *United States*, 305 U.S. 251, 254 (1938)). A defendant seeking disclosure of an informant's identity accordingly bears a substantial burden even if the informant's testimony would be directly relevant to the question of guilt or innocence. See *Roviaro* v. *United States*, 353 U.S. at 60-63. See also *In re Quarles & Butler*, 158 U.S. 532, 535-536

(1895) ("It is the right, as well as the duty, of every citizen * * * to communicate to the executive officers any information which he has of the commission of an offence against th[e] laws; and such information, given by a private citizen, is a privileged and confidential communication * * * the disclosure of which cannot be compelled without the assent of the government.").

The reasons for this privilege are familiar. "'Courts have countenanced the use of informers from time immemorial'" (*Hoffa* v. *United States*, 385 U.S. 293, 311 (1966), quoting *United States* v. *Dennis*, 183 F.2d 201, 224 (2d Cir. 1950) (L. Hand, J.)), and the detection and prosecution of many crimes would simply be impossible without informants. This Court has repeatedly upheld the use of confidential informants as sources of information on which search warrants are based. See, *e.g.*, *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 22-23; *Rugendorf* v. *United States*, 376 U.S. at 533. If an informant's identity is disclosed, not only is he likely to become useless in further investigations, but he may be subject to reprisals. See *McCray* v. *Illinois*, 386 U.S. 300, 308-309 (1967), quoting 8 Wigmore, *Evidence* § 2374 (McNaughton rev. ed. 1961):

> Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm [and] to preclude adverse social reactions * * *. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the

> dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.

In this area, as with most privileges, certainty and predictability are vital. It is not enough that most informants' identities are not disclosed most of the time; law enforcement officers attempting to recruit informants must be able to assure them in advance that their identities will not be disclosed prematurely. "An uncertain privilege, or one which * * * results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981). Nowhere is this more likely to be true than in the difficult and volatile relationship between police and informants. The stakes for informants can be exceedingly high, and the informant's reaction may well be governed by rumor and rational or irrational fears. For this reason, in an area in which the authorities must rely on informants, even an occasional disclosure or the threat of disclosure can prove devastating to law enforcement efforts.

Even in camera disclosures can create serious difficulties. We assume that the inadvertent release of material revealed in camera can be reduced to a minimum or even eliminated; but an informant may not understand that disclosure of his identity to a judge is innocuous. Cf. *Baldridge* v. *Shapiro*, 455 U.S. 345, 361 (1982). In addition, if the informant is called to appear before a judge, there is a danger that the fact of his appearance will become known. Thus, while in camera disclosure of an informant's identity is, of course, vastly less harmful to the government's interests than public disclosure, it is not without potential costs.

3. Consequently, when a criminal defendant seeks to learn an informant's identity as part of a challenge to a facially valid search warrant, his burden is quite properly a great one. On the defendant's side, "the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself" (*United States* v. *Raddatz*, 447 U.S. 667, 679 (1980)); the defendant's interest is not in obtaining a fair trial of his guilt or innocence but only in furthering the prophylactic purposes of the exclusionary rule. See also *Lego* v. *Twomey*, 404 U.S. 477, 488-489 (1972).

Moreover, the justification for compelling the disclosure of an informant's identity is at its weakest when the informant's tip was used not to support a warrantless search but to obtain a warrant.[2] This is true because two aspects of the warrant process act as important safeguards against falsification by the police. First, the warrant affidavit commits law enforcement officers beforehand to a particular version of the facts that support the search. This greatly reduces the likelihood that the officers are inventing facts, because they cannot embellish their justification for the search by drawing on facts they learned only by conducting the search—as they might in the case of a warrantless search. Here, for example, Sergeant DeNovellis's statement that he received information that respondent possessed balloons filled with heroin is highly credible because it was on record before police officers found respondent with heroin packaged in precisely that form (see J.A. 69).

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[2] Even the dissenters in *McCray* v. *Illinois*, *supra*—a case involving a warrantless arrest based on an informant's tip—recognized this point. See 386 U.S. at 314-315 (Douglas, J., dissenting).

Second, when an officer's report of an informant's tip has been included in a warrant affidavit, it has already undergone a degree—potentially a substantial degree—of judicial examination at the hands of the magistrate. In issuing the warrant, the magistrate has necessarily reached a judgment about the affiant's credibility. In addition, under the Federal Rules of Criminal Procedure, the judicial officer issuing a search warrant may insist that the affiant appear before him and may examine the affiant and any other witnesses—including informants—under oath. Fed. R. Crim. P. 41(c)(1).

A defendant's interest in learning an informant's identity is accordingly at its most limited when the defendant seeks only to suppress evidence obtained under a facially valid search warrant. Arrayed against the defendant's limited interest are both the important policies that militate against collateral attacks on search warrants and the government's interest in protecting the identity of informants. For these reasons, the Court in *Franks* explicitly left open "the difficult question whether a reviewing court must *ever* require the revelation of the identity of an informant [even if] a substantial preliminary showing of falsity has been made." 438 U.S. at 170 (emphasis added).

B. Although it is difficult to describe in the abstract the kind of showing that should entitle a defendant to a hearing under *Franks*, it seems entirely clear that respondent's showing did not approach that necessary to obtain such a hearing—much less to compel disclosure of the informant's identity. Respondent offered only his own testimony;[3] and that testimony

[3] It appears from the transcript of the hearing on the suppression motion that respondent may have offered to provide affidavits from family members that would support his testi-

purported to show only that the informant's statements were false—not, as this Court specifically required in *Franks*, that the affiant deliberately or recklessly made a false statement.

1. The Court in *Franks* emphasized that a defendant's mere assertion that an affidavit contained deliberate or reckless falsehoods, or his mere demand for a hearing on the veracity of the affidavit, is insufficient to require a hearing. See 438 U.S. at 171. The only evidence respondent offered was his own testimony. While sworn testimony by a criminal defendant is more than a mere demand, it is not much more. It is hardly a controversial proposition that defendants faced with serious criminal charges are often willing to commit perjury in an effort to escape conviction. Respondent, for example, testified that he had no personal acquaintance with heroin, even though a police officer testified that he removed heroin from respondent's pocket (J.A. 54, 69). To the extent a defendant's own testimony is sufficient to entitle him to a hearing challenging a facially valid warrant, defendants will easily and routinely circumvent the threshold requirement for a hearing that the Court carefully established in *Franks*. See 438 U.S. at 155-156, 167, 170, 171-172.

To be sure, it is possible to imagine instances in which a defendant's testimony alone might be enough to require a further hearing, under *Franks*, to determine whether the warrant is based on reckless or intentional falsehoods. This might happen, for example, if the inherent plausibility of the defendant's state-

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mony (see J.A. 56). But the Colorado Supreme Court does not seem to have relied on this offer in concluding that respondent had made a sufficient showing to justify the trial court's order (see J.A. 137, 138-139).

ment is particularly compelling, if the nature of the dispute makes it impossible for the defendant to develop corroborating evidence, and if the affiant's testimony is not credible. But such circumstances should be very rare, and none of these circumstances was found to be present here.

2. Moreover, even if respondent's testimony were accepted as true, it was manifestly insufficient to obtain a hearing under *Franks*. Respondent testified to the effect that the *informant's* statements were false. This testimony does not tend to show that the *affiant's* statements were recklessly inaccurate or deliberately false; it is at least equally possible that Sergeant DeNovellis was innocently or negligently misled by a deceitful or mistaken informant. As the Court emphasized in *Franks*: "There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. * * * Allegations of negligence or innocent mistake are insufficient." 438 U.S. at 171. Neither the trial court nor the Colorado Supreme Court found, or suggested any basis for finding, that respondent's testimony was a "substantial preliminary showing" (*id.* at 155) of reckless or deliberate falsehood by the affiant. Indeed, the Colorado Supreme Court was explicit in stating that such a showing is not required.

3. Perhaps more important, the Colorado Supreme Court held that respondent's own testimony contradicting the informant was sufficient not only to permit a challenge to the warrant but to require the disclosure of the informant's identity. When the State was unwilling to reveal the informant's name because it feared that doing so would place him in jeopardy (see J.A. 83), the heroin found on respondent's

person was suppressed. In *McCray* v. *Illinois*, the Court held that a defendant's mere demand does not entitle him to obtain the identity of an informant at a suppression hearing. Here, the Colorado Supreme Court, while not ordering the disclosure of the informant's identity on the basis of a mere demand, required such disclosure on the basis of the defendant's testimony that the informant's tip was incorrect —and as we have said, that amounts to little more than a mere demand.[4]

As this case illustrates, the Colorado Supreme Court's approach gives any defendant who is willing to contradict an informant's statement an easy means of defeating a criminal prosecution entirely whenever the State will not reveal the informant's identity because it believes it would endanger him if it did so. This will occur even though the statements in the search warrant affidavit were entirely true. Such an approach cannot be correct. As this Court has said (*McCray* v. *Illinois*, 386 U.S. at 306, quoting *State* v. *Burnett*, 42 N.J. 377, 385, 201 A.2d 39, 43 (1964)):

> If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure. He has nothing to lose and the prize may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is so often the case.

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[4] In addition, as we noted, the justification for requiring the disclosure of an informant's identity is significantly weaker when a defendant is challenging a search warrant than when he is challenging a warrantless search like that involved in *McCray*. See pages 13-14, *supra*.

C. Even if a trial court determines that a defendant made the showing required by *Franks*, it should not order the disclosure of an informant's identity, even in camera, as a matter of course.[5] We have previously explained that the defendant's interest in learning the identity of an informant in order to seek the suppression of evidence obtained through a warrant is decidedly limited, while the government's interest in protecting the confidentiality of informants —even from in camera disclosures—is substantial. In addition, as we will show, revealing the informant's identity will often be less useful than it might appear in determining whether the warrant is tainted by deliberate or reckless falsehoods; and there are alternative methods not requiring the disclosure of the informant's identity for making that determination. For these reasons, even in camera disclosure should be the last resort. Disclosure of the informant's identity to the defendant is warranted, if at all, only in the most extraordinary circumstances.

1. The issue at a hearing conducted pursuant to *Franks* is the affiant's credibility, not the informant's. The affiant will usually be a law enforcement officer, and ultimately the trial judge will have to decide whether he is truthful. The judge's resolution of that question is likely to depend principally on his assessment of the officer's own testimony, not on the testimony of an alleged informant whose interests and motivations may well be inscrutable. In particular, if an informant's identity is being kept confidential because, according to the authorities, he fears reprisals,

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[5] There appears to be some tendency among courts to require the in camera disclosure of an informant's identity as a matter of course once anything approaching the preliminary showing required by *Franks* has been made. See, *e.g.*, *United States* v. *Kiser*, No. 82-1487 (9th Cir. Sept. 26, 1983).

then any testimony he gives after the possibility has arisen that his identity will become known to the defendant will automatically be suspect.

The affiant can be cross-examined by defense counsel. The scope of that examination will necessarily be limited by the need to protect the informant's identity, but it can nonetheless often be very thorough. See, *e.g.*, *McCray* v. *Illinois*, 386 U.S. at 303 (on cross-examination, affiant gave names of persons convicted of narcotics violations as a result of information supplied by confidential informant). Plainly the trial judge should have the discretion to decide that cross-examination of this form is sufficient to test the officer's credibility, and the judge should not permit measures more likely to disclose an informant's identity unless he specifically finds this more cautious approach to be inadequate. Cf. *United States* v. *Kiser*, No. 82-1487 (9th Cir. Sept. 26, 1983), slip op. 4720 nn. 4-5 (rejecting district court's decision to proceed in this fashion without explaining why it was inadequate, even though suspected informant was already dead by time of suppression hearing).

2. In addition, or alternatively, the trial judge can order an in camera proceeding in which the affiant is questioned by the judge. With defense counsel excluded, the affiant is likely to be able to reveal more information, since the government need not be concerned that the defendant will put together pieces of innocuous information and identify the informant. The court can, threfore, examine the affiant more completely without requiring him to produce the informant or even to reveal the informant's identity. While defense counsel would not be physically present at such a hearing, he can participate by suggesting lines of inquiry to the trial judge. Moreover, the record of an in camera hearing can be reviewed by

an appellate court to determine whether the trial judge was sufficiently probing in his inquiry.

3. As a practical matter, a trial judge should generally be able to assess an officer's credibility by permitting limited cross-examination and by examining the officer in camera. But if it is necessary for the government to produce the informant, we can think of no reason why an in camera examination of the informant will not always be sufficient. See 1 LaFave, *Search and Seizure* 584 (1978).

While adversary proceedings are customary in our system, the Fourth Amendment provides a conspicuous exception. It reflects a judgment by the Framers that in a wide range of cases—at least all those in which no adequate retrospective remedy is available—ex parte proceedings are sufficient to protect the interests underlying the Warrant Clause. Ex parte, in camera proceedings are an acceptable basis for issuing a warrant precisely because an adversary hearing at that stage might impair law enforcement interests. See generally *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 560-561 (1978). When an adversary hearing on a motion to suppress will cause an informant's identity to be disclosed, such a hearing will also inflict serious costs on important societal interests. In such instances, the ex parte, in camera procedures that the Framers thought sufficient before the fact should also be sufficient after the fact. Cf. *Palermo* v. *United States*, 360 U.S. 343, 354-356 (1959).

Indeed, an in camera hearing to determine if evidence should be suppressed has several advantages over a hearing before a magistrate on a warrant application. It will not be conducted in haste. The trial judge, unlike the magistrate, will be "acquaint[ed] with the information that may contradict the good faith and reasonable basis of the affiant's allegations"

(*Franks*, 438 U.S. at 169). And a trial judge may be more inclined than a magistrate to examine the government's evidence critically.

CONCLUSION

The judgment of the Colorado Supreme Court should be reversed.

Respectfully submitted.

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